

Law360

Capitalizing On Increased Retail Access To Alternative Assets

By **Debra Franzese, Larissa Marcellino and Jennifer Porter** (June 25, 2026)

As alternative asset managers confront a challenging fundraising market and retail investors show interest in seeking yield, particularly given the inflationary market environment, the prospect of providing alternative investment options and raising capital from retail investors looms large.

Retail investors have been largely unable to invest in alternative products due to strict requirements on regulated fund structures, as well as the practical challenges associated with the liquidity and valuation of private assets. However, recent trends in the retailization and democratization of access to these products have given many alternative asset managers reason to consider offering investment options to retail investors.

Given the market focus and growing competition in this space, alternative asset managers must decide whether, and to what extent, they would like to participate in managing any products open to retail investors. And for those managers that have already taken the plunge, key questions remain on how best to bridge the gap between private market offerings and retail investor offerings.

Background

Providing retail access to alternative investments has been a focus of the current administration and regulators. For example, President Donald Trump issued an executive order in August 2025 regarding democratizing access to alternative assets for 401(k) investments, and on March 31, 2026, the U.S. Department of Labor published a regulation clarifying and providing a safe harbor in connection with selecting alternative assets and other designated investment alternatives for 401(k) plans and other participant-directed individual account plans.[1]

Further, in November, SEC Commissioner Mark Uyeda gave a speech in which he noted that private assets can enhance portfolio performance and reduce volatility, given that they may be less correlated to the public markets.[2]

In April 2025, the U.S. Securities and Exchange Commission also granted co-investment orders that permit funds, including registered closed-end funds and business development companies, to participate in co-investment transactions with certain affiliated entities that would otherwise be prohibited by the co-investment restrictions under the Investment Company Act, subject to specified conditions.[3]

Following a Jan. 26, 2026, request from the Investment Company Institute,[4] the SEC's Division of Investment Management staff issued a no-action letter to J.P. Morgan Investment Management Inc. on April 27 that confirmed it would not recommend enforcement action if open-end funds participate in co-investment transactions under orders with conditions substantially identical to the co-investment order.[5]



Debra Franzese



Larissa Marcellino



Jennifer Porter

The no-action letter also provided an important modification to the co-investment order's so-called required majority condition.[6] In recognition of the often larger size of the boards of directors of open-end funds, such funds can delegate the responsibilities in the required majority condition to a board committee, so long as the committee (1) consists of at least three directors with no financial interest in the relevant transaction that are not interested persons of the regulated fund; (2) has a majority of members that vote to approve each proposed co-investment transaction; and (3) reports to the full board at its next regular meeting certain information about each co-investment transaction considered by the committee.[7]

In light of these developments enhancing retail investors' ability to access alternative investment products, there are several considerations that asset managers may want to take into account.

1. Ability to Seek Unified Allocation Across the Full Product Suite

One strategic implication of the no-action letter is that asset managers managing both private funds and open-end funds can rely on co-investment orders that they already have for closed-end funds or business development companies, or can seek new exemptive relief from the SEC to allocate private market opportunities across their entire product platform.

Such allocations will continue to be limited to circumstances where the investment is appropriate for a particular fund and consistent with any liquidity requirements of an applicable open-end fund, but sponsors no longer need to exclude mutual funds and exchange-traded funds from even considering these investment opportunities.

This represents a meaningful operational shift that could provide the open-end funds and the asset managers with increased investment opportunities given their ability to speak for a larger check size across their platforms.

As a result of this development, asset managers with a range of product offerings can simplify their investment allocation process and permit a more holistic allocation of investment opportunities across clients, enabling open-end funds to have access to larger, more bespoke transactions on stronger terms than they might achieve negotiating alone.

Asset managers with open-end funds may want to consider whether to apply existing relief to their open-end funds, or, if they do not already have an order, seek co-investment relief.

Asset managers relying on such orders to incorporate open-end fund participation in these types of transactions are encouraged to review and update their current investment allocation policies and procedures consistent with their orders. They are also encouraged to review whether any additional procedures and monitoring are necessary to ensure continued compliance with other rules, such as Rule 22e-4 under the Investment Company Act.[8]

2. Positioning for the Retirement Market's Private Markets Push

This extension of co-investment relief to open-end funds arrives at a moment of extraordinary policy convergence around retail access to private markets. The August 2025 executive order directed federal agencies, including the Department of Labor, to expand private market access for retail investors through their defined contribution retirement plans in connection with the plans' ability to invest in alternative assets.[9]

The March DOL rule introduced a six-factor safe harbor for 401(k) fiduciaries to consider in selecting designated investment alternatives, including alternative assets.[10] While this rule was not limited solely to alternative assets and is still subject to finalization, it could provide opportunities for Employee Retirement Income Security Act plan sponsors to potentially include alternative assets, though some industrywide challenges remain.

Consistent with the view expressed by the current administration, Uyeda has publicly argued that private securities should be considered "as part of diversified portfolios in defined contribution plans," noting that "while there might be debate on what is the optimal level of exposure to private investments, what is clear is that the answer is NOT zero." [11]

The extension of the co-investment relief to open-end funds is consistent with that theme and overall objective, given that open-end funds are often the vehicle of choice for target-date funds,[12] which are a common holding of 401(k) participants. Without including open-end funds in the co-investment relief framework, retail investors' indirect access to private market opportunities through their retirement accounts could have remained structurally constrained.

This relief could significantly expand the ability for these products to gain access to private market transactions in which their managers' other funds are participating.

For asset managers looking to expand their offerings to products in which retail investors can invest, this creates a compelling product development thesis: open-end funds that can offer indirect private market exposure subject to the investor protections of the Investment Company Act, including the daily liquidity and net-asset-value pricing of open-end funds, and independent board oversight.

3. First-Mover Advantage and Competitive Differentiation

Given the current overall regulatory support for increasing retail investors' access to private markets, asset managers that have not thought through their potential retail strategy would be well advised to do so — particularly before the finalization of the DOL rule.

In an evolving industry that moves quickly, we anticipate a real first-mover advantage — particularly given the operational, structural and distribution realities necessary for raising and administering SEC-registered funds that can provide retail investors with exposure to alternative assets.

Particularly, managers that have historically solely managed private funds should evaluate several issues in order to prepare to take advantage of the immediate retail opportunities, including becoming familiar with the rules under the Investment Company Act and their impact on any proposed strategy and fund operations, the increased corporate governance requirements for SEC-registered funds, and restrictions on affiliated transactions and the timing of valuations, especially for an open-end fund with requirements to calculate the fund's net-asset value daily.

Over the past five years, there has been a significant increase in the number of interval funds and tender offer funds that have been launched,[13] and those managers already offering such funds may be more familiar with the SEC's processes and managing a registered fund. Accordingly, they may be able to move more quickly in connection with fund launches designed to take advantage of the expanded co-investment relief and access to the 401(k) market.

Given this reality, it is important for asset managers interested in this space to consider what actions they can take now to prepare their business to offer these types of products.

Conclusion

The extension of co-investment relief to open-end funds represents the latest in a series of regulatory actions aimed at providing retail investors with meaningful private market opportunities.

For asset managers willing to invest in the compliance infrastructure and governance frameworks necessary to operationalize the development and management of these products, this could be a substantial opportunity to create a meaningful competitive differentiation in a rapidly evolving product landscape.

Given that the race for retail capital continues to accelerate, the time is now for alternative asset managers to develop a retail strategy to capitalize on the opportunity.

Debra Franzese is a partner at Willkie Farr & Gallagher LLP.

Larissa Marcellino is a partner at the firm.

Jennifer Porter is a partner at the firm. She previously served as assistant director in the SEC's Division of Investment Management.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Exec. Order, Democratizing Access to Alternative Assets for 401(k) Investors (Aug. 7, 2025), available at <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>; Fiduciary Duties In Selecting Designated Investment Alternatives, RIN 1210-AC38 , (Mar. 31, 2026), available at <https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives>.

[2] Commissioner Mark T. Uyeda, The Diversification Deficit: Opening 401(k)s to Private Markets, Remarks at ICI's Retail Alternatives and Closed-End Funds Conference (Nov. 2025), available at <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-diversification-deficit-opening-401ks-private-markets-112025>.

[3] See, e.g., Investment Company Act sections 17 and 57, and the rules thereunder; FS Credit Opportunities Corp., et al., Investment Company Act Release Nos. 35520 and 35561 (Apr. 29, 2025), available at <https://www.sec.gov/rules-regulations/2025/04/fs-credit-opportunities-corp-et-al>.

[4] Letter from ICI to Brian Daly, Director, SEC Division of Investment Management (Jan. 26, 2026), available at <https://www.ici.org/system/files/2026-01/26-cl-co-investment-open-end-funds.pdf>.

[5] Letter from the Staff of the SEC Division of Investment Management (Apr. 27, 2026), available at <https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-investment-management-staff-no-action-interpretive-letters/jp-morgan-investment-management-inc-042726>. For more information regarding the no-action letter, see Benjamin Allensworth et al., SEC Staff Extends Principles-Based Co-Investment Relief to Open-End Funds, WILLKIE FARR & GALLAGHER LLP (Apr. 30, 2026), available at <https://www.willkie.com/-/media/files/publications/2026/04/sec-staff-extends-principles-based-co-investment-relief-to-open-end-funds.pdf>. The relief is limited to co-investment exemptive orders that impose conditions substantially identical to those included in the co-investment order granted to FS Credit Opportunities Corp.

[6] See supra footnote 5.

[7] See supra footnote 5.

[8] 17 C.F.R. § 270.22e-4

[9] See supra footnote 1.

[10] See supra footnote 1 (under the DOL Rule, to presumptively meet their duties under ERISA, the 'safe harbor' fiduciaries should consider and demonstrate making considerations on a non-exhaustive list of six factors: (1) Performance; (2) Fees; (3) Liquidity; (4) Valuation; (5) Benchmarking; and (6) Complexity). See Baltz, Brian, et al., Prudence Reimagined: DOL Proposes New Safe Harbor For Fiduciary Investment Selection in ERISA 401(k) Plans (Apr. 8, 2026), available at <https://www.willkie.com/-/media/files/publications/2026/04/prudence-reimagined-dol-proposes-new-safe-harbor-for-fiduciary-investment-selection-in-erisa-401-k.pdf>.

[11] See supra footnote 2.

[12] See supra footnote 4.

[13] Inv. Co. Inst., A Guide to Closed-End Funds (Apr. 22, 2026), available at https://www.ici.org/cef/background/bro_g2_ce (see chart illustrating the number of interval funds increasing from 66 in 2020 to 148 in 2025 and the number of tender offer funds increasing from 78 in 2020 to 130 in 2025 and the total assets increasing from \$39 billion to \$131 billion and \$34 billion to \$116 billion during that time period, respectively, for these funds).